BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARSHA M. HAMILTON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,049,402
WINFIELD REST HAVEN INC.	)	
Respondent	)	
AND	)	
	)	
MIDWEST INSURANCE COMPANIES INC.	)	
Insurance Carrier	)	

ORDER

Respondent appeals the March 2, 2010, preliminary hearing Order of Administrative Law Judge John D. Clark (ALJ). Claimant was awarded medical benefits with Alvin D. Bird, D.O., as the authorized treating physician and all medical was ordered paid after it was determined that claimant had suffered an accidental injury which arose out of and in the course of her employment with respondent on November 2, 2009.

Claimant appeared by her attorney, James B. Zongker of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, James P. Wolf of Kansas City, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held March 2, 2010, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did claimant suffer an accidental injury on November 2, 2009, which arose out of and in the course of her employment with respondent? Claimant jammed the middle finger on her right hand while tucking her jeans into her boots. Respondent contends this is a personal injury and not compensable. Claimant contends she had to adjust her pants after taking a resident to the bus in cold, rainy weather.

2. Is the weather data attached to respondent's brief properly before the Board for its consideration? The material was not offered to the ALJ at the preliminary hearing. Claimant objects to the weather data on that basis.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant was employed by respondent in the area of social services, activities and transportation. Her job required that she lift, push, pull and tug on a regular basis, doing the work of a CNA (certified nursing assistant). She regularly handled wheelchairs. On November 2, 2009, claimant was transporting a resident to the doctor's office. The weather was cold and rainy. After returning the resident to respondent's bus, claimant adjusted her pants in her boots. She felt an onset of pain in her middle finger on her right hand. Claimant reported the injury to her supervisors, Susan Danler and Ola Utt. Claimant continued at her job. Claimant testified that the pain in her finger kept getting worse. Claimant went to the office of Alvin D. Bird, D.O., on December 30, 2009, where she was examined by Shanell Isom, identified by claimant as Dr. Bird's physician's assistant.[1] X-rays suggested an avulsion fracture of the extensor tendon of the right third finger. Claimant was referred to a hand specialist. The history of accident provided to Dr. Bird's staff mirrored claimant's testimony at the preliminary hearing. Claimant testified that she delayed medical treatment because she thought she had just jammed the finger and it would get better.

Claimant acknowledged that the accident was a fluke.[2] The pants claimant was wearing were not provided by respondent, nor were the boots. The pants were described as nicer blue jeans. The boots were ones with fur on the top. Claimant also admitted that the accident could have happened at home or while shopping, or almost anywhere.

PRINCIPLES OF LAW AND ANALYSIS

The Board is limited under K.S.A. 2009 Supp. 44-551 to reviewing issues presented to and decided by an administrative law judge.

The admissibility of the weather reports was not presented to nor determined by the ALJ. The Board does not consider issues or evidence not initially presented to the administrative law judge, absent an agreement of the parties. No such agreement exists here on that admissibility issue.

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[1] Ms. Isom is an ARNP, which is an advanced registered nurse practitioner.

[2] P.H. Trans. at 8-9.

K.S.A. 2009 Supp. 44-555c grants the Board the jurisdiction to review questions of fact and law as presented to and determined by an administrative law judge. The Board is not granted original jurisdiction over workers compensation issues, but is limited to considering issues on appeal from administrative law judge decisions.[3]

This Board Member acknowledges that the rules of evidence under K.S.A. 60-401 are not applicable in workers compensation proceedings. The admissibility of evidence is more liberal in compensation cases, not more restrictive.[4] However, there needs to be some basis to verify the accuracy of the presented information. Here, there is none. Due to the failure to present the information to the ALJ, and the inability by this Board Member to verify its accuracy, the weather information attached to respondent's brief to the Board will not be considered.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[5]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[7]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

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[3] K.S.A. 2009 Supp. 44-555c(a).

[4] *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

[5] K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

[6] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[7] K.S.A. 2009 Supp. 44-501(a).

> injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[8]

There is no argument that claimant's accident occurred in the course of her employment with respondent. Claimant was transporting a resident to and from a doctor's appointment, a task of her job. However, whether the accident arose out of the job is a more difficult question. There is nothing in claimant's job description requiring that she tuck her pants into her boots. However, it behooves both claimant and respondent that claimant provide a clean, neat appearance to the public. She is a representative of respondent and, as such, has a responsibility to not embarrass her employer or present herself in an untidy or sloppy manner. Thus, keeping her appearance neat and clean is a mutual benefit for claimant and her employer.

Respondent argues that claimant's actions which led to this injury are nothing more than the normal activities of daily living and, pursuant to K.S.A. 2009 Supp. 44-501(a), are not compensable.

> An injury is not compensable unless it is fairly traceable to the employment and comes from a hazard which the worker would not have been equally exposed to apart from the employment.[9]
>
> An injury shall not be deemed to have been directly caused by the employment where the injury results from normal activities of day-to-day living.[10]

The claimant, in *Johnson*, had a long history of left knee problems with medical reports indicating years of degeneration. The claimant suffered an injury to her left knee when she simultaneously turned in her chair and attempted to stand while reaching for a file that was overhead. The Kansas Court of Appeals ruled that the simple act of standing was a normal activity of daily living. Benefits under the Workers Compensation Act were denied. In this instance, there is no indication that claimant suffered any preexisting problems with her finger. The injury occurred as the result of a single incident while claimant was performing her job for respondent. This Board Member finds that claimant did suffer an accidental injury which arose out of and in the course of her employment with respondent. The award of benefits by the ALJ is affirmed.

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[8] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[9] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 1, 147 P. 3d 1091, *rev. denied* 281 Kan. ___ (2006).

[10] *Id. at* Syl. ¶ 2.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied her burden of proving that she suffered an accidental injury which arose out of and in the course of her employment with respondent. The award of benefits is affirmed. The weather reports attached to respondent's brief to the Board are not accepted as part of the record in this matter.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge John D. Clark dated March 2, 2010, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May, 2010.

HONORABLE GARY M. KORTE

c: James B. Zongker, Attorney for Claimant
James P. Wolf, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

[11] K.S.A. 44-534a.